United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1903

To be argued by
ROBERT ANDREW WILD

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM A. BARRETT, M.D.,

Plaintiff-Appellant,

—against—

UNITED HOSPITAL; RICHARD A. STOLNACKE, Executive Director of United Hospital, individually and in his official capacity; ALFRED D. GRANT, M.D.; JAMES A. SUDBAY, M.D.; EUGENE WASSERMAN, M.D.; J. DOUGLAS HALLOCK, M.D.; H. CLAY JOHNSON; WILLIAM H. JENNINGS; CHARLES R. C. STEERS; WILLIAM REES; JACK GANTZ; RICHARD D. LOMBARD; DAVID GILE; RICHARD W. DAMMON; MRS. THOMAS H. LANE; EDWIN H. KAUFMAN, M.D.; CHARLES J. ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.; H. EUGENE SEANOR, M.D.; DAVID A. WILSON, M.D.; JOHN H. DALE, JR., M.D.; LEO T. DELANEY, M.D.; MRS. EDNA DELZIO, R.N.; WILLIAM C. FELCH, M.D.; ABRAHAM L. HALPERN, M.D.; MRS. HARVEY KELSEY; LAWRENCE MARX, JR.; MRS. EMIL MOSBACHER, JR., MARTIN NESCHI, M.D.; JOEL J. SCHWARTZMAN, M.D.; JOSEPH SILBERSTEIN, M.D.; DAVID A. W. WILSON, M.D.; C. JONATHAN SHATTUCK; SAMUEL DRAGO, M.D.; VIRGINIA HAGGERTY, M.D.; PHILIP JENSEN, M.D.; SHELBY LEVER, M.D.; HAROLD ROTH, M.D.; JACOB SHRAGOWITZ, M.D.; and RONALD DEE, M.D.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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2

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF STATUTES

TABLE OF STATUTES (Continued)

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- X

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

A P P E L L E E S' B R I E F

ISSUES PRESENTED FOR REVIEW

1. Whether the action of United Hospital and the individually named defendants, in denying Medical Staff privileges to Dr. Barrett, was taken "under color of law" so as to transform the action of an admittedly private institution into "state action"?

2. Assuming the action of the defendants was taken "under color of law", was the plaintiff nevertheless afforded all of his constitutional rights thereby leaving no issues of fact or law to be decided?

STATEMENT OF THE CASE

This action was commenced on April 18, 1973, by William A. Barrett, M.D., against United Hospital, a voluntary, not-for-profit hospital, its Board of Trustees, and various physicians who served on the Medical Staff Committees which reviewed Dr. Barrett's application for Medical Staff privileges. The dispute arose as a result of the hospital's denial of Medical Staff privileges to Dr. Barrett. In this action, Dr. Barrett is seeking declaratory, injunctive, mandamus and monetary relief alleging violation of the First, Fifth, Eighth, Ninth, and Fourteenth Amendments of the United

States Constitution and of the Civil Rights Act of 1871 (42 U.S.C. Section 1981 et seq.), asserting jurisdiction under 28 U.S.C. Sections 1331, 1343, and 1361.

In response to the plaintiff's complaint, the defendants moved, pursuant to Rule 12(b)(1) and (6) of tne Federal Rules of Civil Procedure, to dismiss the complaint. The District Court (Judge Bauman presiding) treated the motion as one for summary judgment and dismissed the complaint on the basis that the plaintiff had failed to demonstrate that the action of the defendants was "state action" or action taken "under color of state law" and accordingly, the plaintiff had failed to state a claim for which relief could be granted. (R198-230A)*

Dr. Barrett is appealing the dismissal of the action.

Dr. Barrett was a member of the Medical Staff of United Hospital for approximately twenty (20) years prior to 1966. In 1966 he was indicted on two (2) counts of criminal abortion in violation of the then Section 125.40 of the Penal Law of the State of New York. In 1968, he pleaded guilty to the crime of third-degree assault and his plea was accepted in satisfaction of all charges. (R81-2A)

Thereafter, at a regular meeting of the Board of Trustees of United Hospital to consider reappointment of all

*Here and henceforth herein citations "R digit A" refer to pages of the Appendix.

their Medical Staff members held on September 16, 1968, the Board of Trustees of the hospital voted not to reappoint Dr. Barrett to its Medical Staff for the hospital year 1969. The Board of Trustees had withheld action on Dr. Barrett's Medical Staff status throughout the years of 1967 and 1968, pending the outcome of the criminal proceedings (R82A).

On April 14, 1969, the plaintiff's license to practice medicine in the State of New York was revoked by the Commissioner of Education for a period of two (2) years. On February 4, 1971, the Commissioner of Education entered an order restoring Dr. Barrett's license, effective July 1, 1971. Dr. Barrett advised United Hospital of the restoration of his license and requested that his privileges at the hospital be restored. (R82A)

In response to Dr. Barrett's request, the hospital, through its Executive Director, Richard A. Stolnacke, forwarded an application for Medical Staff privileges to Dr. Barrett. Upon the hospital's receipt of the completed application form, the application was forwarded to the Credentials Committee of the hospital's Medical Staff in accordance with the hospital's procedure, as set forth in its Medical Staff Bylaws. (R135-6A)

After the Credentials Committee had received Dr. Barrett's application, and prior to the Committee's review, an interview was arranged between Dr. Barrett and

Dr. David A. W. Wilson, Director of Surgery at United Hospital, the department in which privileges were requested. On November 3, 1971, the Credentials Committee convened in special session to review Dr. Barrett's application. After due consideration, the Credentials Committee unanimously voted not to recommend Dr. Barrett for staff privileges (R102-6A).

On December 14, 1971, the Medical Council of the Medical Staff met and considered the plaintiff's application for staff privileges. At this meeting, the Medical Council, after considering the recommendation of the Credentials Committee and the Director of the Department, unanimously voted not to recommend the plaintiff for appointment and this decision was transmitted to the Executive Committee of the Board of Trustees. (R108A)

On January 4, 1972, the Executive Committee of the Board of Trustees met and considered the recommendations of the Credentials Committee and the Medical Council. After due consideration of all prior recommendations and after its own deliberations, the Executive Committee unanimously voted to deny staff privileges. (R111A) Dr. Barrett was notified of this decision on January 17, 1972, and was further advised of his right to a hearing in connection with the denial of privileges. (R112A)

On January 24, 1972, Dr. Barrett advised the hospital that he wished a hearing before the Joint Conference Committee. A hearing was scheduled for February 16, 1972, and prior to the hearing date, the hospital wrote to Dr. Barrett advising him of the grounds for the denial of privileges. (R113A) On February 16, 1972, a hearing was held before the Joint Conference Committee (a committee composed of physicians and Trustees). Dr. Barrett was present and was accompanied by counsel of his choice. Dr. Barrett was afforded an opportunity to respond to the various reasons for the hospital's denial of privileges as set forth in its letter dated February 10, 1972. In addition, Dr. Barrett was permitted to ask questions of the members of the Committee. (R32-77A)

On March 27, 1972, the Joint Conference Committee convened for the purpose of considering the results of the hearing held on February 16, 1972. At this meeting, it was unanimously agreed that all prior action of all Committees be affirmed and that privileges not be granted to Dr. Barrett. (R115A) On April 17, 1972, the Executive Committee of the Board of Trustees, meeting in special session, received the recommendation of the Joint Conference Committee. After due consideration, the Executive Committee unanimously voted to affirm the decision of the Joint Conference Committee (R116-8A) This recommendation was received by the Board of Trustees at their next regularly scheduled meeting and the Board, after

considering all prior proceedings, unanimously voted to affirm the denial of privileges. On May 3, 1972, Dr. Barrett was advised of this decision (R154A), and approximately one (1) year thereafter (April 18, 1973) this action was commenced.

SUMMARY OF ARGUMENT

United Hospital is a voluntary, not-for-profit hospital corporation organized and existing under and by virtue of the Not-For-Profit Corporation Law of the State of New York. It is conceded by all parties that United Hospital is legally and formally a "private" institution. (R204A) Its Board of Trustees is composed of individuals who have volunteered their services and time to the hospital and therefore to the community which it serves. Richard A. Stolnacke, the Executive Director of United Hospital is employed by the hospital corporation to carry out its day-to-day functions. The individual physicians and Trustees named in this action were voluntary members of the various Committees which reviewed Dr. Barrett's application for Medical Staff privileges. Their duties as Committee members included reviewing the credentials and qualifications of physicians who apply for privileges at the hospital in order to assure the community to the greatest extent possible of the finest quality of medical care.

When an application for Medical Staff privileges is denied, that action is "private" action, and is not taken "under color of state law." Even assuming that the hospital is subject to a plethora of state and federal regulations, that it has received a federal tax-exemption and federal Hill-Burton funds and that it participates in the Medicare and Medicaid Programs, these factors do not make the action of the hospital, in denying any physician's application, "state action" thereby subjecting the hospital to constitutional standards. (See e.g., Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971); Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973)).

In addition, and the "state action" question aside, the decision below should nevertheless be affirmed since the defendants have afforded the plaintiff full due process as required by the hospital's Bylaws (R136A) and as that term has been defined by the Courts, thereby removing from question all issues of law and of fact.

POINT I

THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED SINCE THE ALLEGED VIOLATIONS IN NO MANNER INVOLVED "STATE ACTION" OR ACTION TAKEN "UNDER COLOR OF STATE LAW."

Dr. Barrett, in his complaint, alleges that the within action is authorized by the First, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, and the Civil Rights Act of 1871 (42 U.S.C. 1981 et seq.). Specifically, Dr. Barrett contends that the defendant hospital and its Board of Trustees violated Sections 1983, 1985, and 1986 of Title 42 of the United States Code (R6A).

A brief examination of these provisions indicates that Section 1983 authorizes a civil action for deprivation of civil rights, when the alleged deprivation occurs "under color of state law." Section 1985 concerns itself with conspiracies to interfere with the civil rights of another, and Section 1986 permits an action against any person, who knowing of a Section 1985 conspiracy, and who could prevent or thwart such conspiracy, fails to do so.

Although 42 U.S.C. 1985 and 1986 do not state that the violative conduct must be taken "under color of state law", nevertheless, such a requirement has uniformly been read

into these sections. Collins v. Hardyman, 341 U.S. 651 (1969). The only exception to the "state action" requirement is in those cases where a plaintiff alleges and proves racial or class-based invidiously discriminatory animus. Griffin v. Breckenridge, 403 U.S. 88 (1971). In Griffin, the Court stated:

> "The constitutional shoals that would lie in the path of interpreting 1985 (3) as a general Federal tort law can be avoided by giving full effect to the congressional purpose by requiring, as an element of the cause of action, the kind of invidiously discriminatory... [animus]... stressed by the sponsors of the limiting amendment... The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (Id. at 101-2)

It is clear that the Supreme Court in deciding Griffin, did not intend to make that section applicable to the facts in the instant case. Here, the plaintiff has not, and could not, allege or prove invidiously discriminatory animus on the part of the defendants. Thus, in order to state a claim upon which relief can be granted, the plaintiff must prove that the defendants acted "under color of state law." The Bill of Rights and the Fourteenth Amendment erect a shield against merely private conduct, regardless of how discriminatory or wrongful that conduct may be. Shelley v. Kraemer,

334 U.S. 1, 13 (1948); The Civil Rights Cases, 109 U.S. 21 (1883); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

Dr. Barrett urges that the District Court's decision be reversed and that the matter be remanded for a trial wherein Dr. Barrett will be given the opportunity to prove "weighty and overwhelming detail and amount of state involvement" on the part of United Hospital. (Appellant's Brief at p.7) It is submitted that Dr. Barrett has had every opportunity to substantiate this point and is simply not able to do so.

In support of the "weighty and overwhelming detail and amount of state involvement", Dr. Barrett points to a number of factors which, when taken as a whole, allegedly transforms the conduct of a "private" institution such as United Hospital, into "state action." The test to determine the application of the factors is, according to Dr. Barrett, the five factor test considered by this Court in Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1973). However, Appellees urge that the categorization of concepts set forth in the Jackson decision, while helpful in determining the extent of state involvement in the activities of a "private" institution, are not dispositive of the issues in this case. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington

Parking Authority, 365 U.S. 715, 722 (1961). Accordingly, we must examine the five (5) factors set forth in Jackson to determine whether United Hospital is so entwined with state involvement as to render its conduct, in denying Dr. Barrett Staff privileges, "state action." Evans v. Newton, 382 U.S. 296 (1966).

At the outset it must be remembered that Jackson involved a charge of racial discrimination on the part of certain private foundations. It was specifically because of this question of racial discrimination that this Court when promulgating the "five factor" test, stated:

> "The formulation of this definition of 'state action' is applicable only to claims of racial discrimination. As noted above, conduct which is admittedly part private and part governmental must be more strictly scrutinized when claims of racial discrimination are made."
> (496 F.2d at 635) (emphasis added)

This Court then went on to state:

> "Prior case law while not directly controlling is not, of course, unenlightening. It is noteworthy that several courts have considered claims that the activities of tax-exempt organizations constitute 'state action.' Significantly, these cases divide into two groups: Where racial discrimination is involved, the courts have found 'state action' to exist; where other constitutional claims are at issue (due process, freedom of

> "speech), the courts have generally concluded that no 'state action' has occurred... (citing cases)... This dichotomy is explained in part by the double 'state action' standard which has been recognized - one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims. (496 F.2d at 628-9) (emphasis added)

Dr. Barrett has not alleged racial or class-based discrimination. His claims, while constitutional in nature, encompass other constitutional objections. With this in mind, and in light of the limiting language of Jackson, Judge Bauman promulgated the "three-pronged test" (R205A) for determining the existence of "state action" in a claim of this type, as opposed to adopting the more rigorous "five factor" test which this Court set forth in Jackson (496 F.2d at 629). In any event, whether the "three-pronged test" or the "five factor" test is applied to the issues at hand, the result will be the same: Unless there is significant state involvement, and that involvement significantly affects the decision made by the private institution, "state action" does not exist. The "state" involvement with United Hospital was not and is not that type of significant involvement which when taken with the decision of the hospital to deny Staff privileges to Dr. Barrett, or to any physician, renders that decision "state action". (See e.g., Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Martin v. Pacific Northwest Bell Telephone Co.,

441 F.2d 1116 (9th Cir. 1971); Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971).

Relying upon the "five factor" test enumerated in Jackson, Dr. Barrett has discussed each factor and has allegedly shown how United Hospital has failed to disqualify itself from that factor thereby necessitating a finding that the hospital's action is equivalent to action taken "under color of state law." In addition to taking issue with the applicability of the "five factor" test, the hospital contends that even if that test is to be utilized as the yardstick, it would still result in a finding of lack of "state action."

FACTOR I: FISCAL DEPENDENCE

First, it is claimed that the hospital's fiscal dependence on governmental aid is a sufficient basis for finding "state action." Dr. Barrett's complaint alleges (R8A) that United Hospital receives governmental aid from a number of sources and that this aid, when considered as a whole necessarily subjects the hospital's actions to constitutional standards. Admittedly, the hospital has been granted a tax-exemption by the United States Government because of its not-for-profit status. The hospital has also received some money under the Federal Hill-Burton Program (42 U.S.C. Section 291 et seq.), and has participated in the Medicare and Medicaid Programs when services were rendered to the elderly and indigent.

Dr. Barrett would have the Court believe that every piece of equipment and every building on the hospital's property was either purchased by or constructed with, money received under the Federal Hill-Burton Program. This has never been conceded by the hospital and is, in fact, not the case. The hospital's Hill-Burton grant amounted to some SEVEN HUNDRED THOUSAND ($700,000.00) DOLLARS which was used in conjunction with the construction of an addition to the hospital at a total cost of almost FIVE MILLION ($5,000,000.00) DOLLARS. The balance of the necessary funds over and above Hill-Burton monies was raised privately.

Regarding the defendant's participation in the Medicare and Medicaid Programs, these are in essence forms of health insurance providing benefits to patients, not to hospitals. If, for example, not a single Medicare or Medicaid patient ever came to United Hospital during a specified period of time, the hospital would receive no monies from these programs for that period. It also must be remembered that the Medicare and Medicaid Programs came into existence in 1966 and that the hospital existed and treated patients for many decades prior to that time. There are literally tens of thousands of private physicians, dentists, clinics, and pharmacies that accept Medicare and Medicaid payments, and therefore are participating in the programs. Are these too now to be considered "arms of the state" in their activities?

Nevertheless, pointing to the receipt of these forms of "aid" Dr. Barrett concludes that the requisite "state action" is present. In fact, in Jackson the mere finding of tax-exempt status was sufficient to satisfy the requisite fiscal dependence required to subject the private foundations to constitutional standards. However, in light of the particular facts of Jackson, it is not surprising that the Court reached such a conclusion. (See e.g., Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964); Norwood v. Harrison, 413 U.S. 455 (1973)).

Since Walz v. Tax Commission, 397 U.S. 664 (1970) there has been a marked de-emphasis on the concept that the granting of tax-exempt status will convert the action of an individual into "state action." The Supreme Court held in Walz, that tax-exemption does not constitute sponsorship of a private enterprise (397 U.S. at 675). Also in accord with Walz, are cases such as Mulvihill, 329 F. Supp. 1020 (S.D.N.Y. 1971); Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973); and Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969).

As far as the hospital's fiscal dependence on other aspects of state and federal financing, these arguments have previously been presented to a number of courts and have been rejected. In each case, the courts have clearly stated that the receipt of Hill-Burton money and participation in the

Medicare and Medicaid Programs are not sufficient to transform the conduct of a "private" institution into "state action." (See, Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971); Taylor v. St. Vincent's Hospital, 369 F. Supp. 948 (D. Mont. 1973); Hoberman v. Lock Haven Hospital, 377 F. Supp. 1178 (M.D. Pa. 1974); Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973); cert. denied ___ U.S. ___, 94 S. Ct. 2413 (1974); Slavcoff v. Harrisburg Polyclinic Hospital, 375 F. Supp. 999 (M.D. Pa. 1974); Barrio v. McDonough District Hospital, 377 F. Supp. 317 (S.D. Ill., N.D. 1974); Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973); Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir. 1971); Allen v. Sisters of St. Joseph, 361 F. Supp. 1212 (N.D. Texas 1973); See also, Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); cf. Grossner v. Trustees of Columbia University, City of New York, 287 F. Supp. 535 (S.D. N.Y. 1968); Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Sandmire v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Stanturf v. Sipes, 335 F.2d 224 (8th Cir. 1964).

The defendants-appellees concede that in certain instances an allocation of governmental aid could lead to a conclusion that "state action" is present, however, such conclusion cannot be predicated upon the allocation itself,

but rather there must be a finding that the "private" institution could not exist without the allocation of aid, and further, that the allocation directly supported the challenged activity. (See e.g., Cooper v. Aaron, 358 U.S. 1 (1958); Smith v. Holiday Inns of America, Inc., 336 F.2d 630 (6th Cir. 1964)). In the case at bar, it is clear that the hospital's acceptance of Hill-Burton funds for a small portion of its construction, and its participation in the Medicare and Medicaid Programs in no manner supported the denial of privileges to Dr. Barrett. Without the existence of this important factor, Dr. Barrett's claim of fiscal dependence falls short of the type of governmental support required to conclude that the action of the hospital was equivalent to "state action."

Dr. Barrett has cited the Health Program Extension Act of 1973 (Pub. L. 93-45, effective June 18, 1973) as authority for the proposition that receipt of Hill-Burton money subjects an institution to constitutional standards. In particular, he calls the Court's attention to Section 300a-7 (42 U.S.C. Section 300a-7) which states that despite the receipt of any grant, contract, loan or loan guarantee under the Hill-Burton Program, any individual or institution which receives such money shall not be required to perform or assist in the performance of any sterilization procedure or abortion. It further states that an entity need not make facilities available or provide personnel for the performance or assistance in such

procedures. The Act also says any institution which receives Hill-Burton monies shall not discriminate in employment, promotion, or extension of staff or other privileges to any physician because he performed or assisted in the performance of a lawful sterilization procedure or abortion. Of course, discrimination is prohibited as to any employee who refuses to perform or assist in the performance of a procedure of abortion due to his religious beliefs or moral convictions.

While this new provision has proved helpful in codifying the law in cases such as Sandmire v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973) and Allen v. Sisters of St. Joseph, 361 F. Supp. 1212 (N.D. Texas 1973), it serves little purpose in the case at bar which was commenced prior to the effective date of the statute.

In addition, with the liberalization of abortion laws as required by Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), such a statute was mandated because the "state action" concept is more rigorously applied in cases involving racial or class-based discrimination. The denial of an abortion due to religious or moral convictions could result in class-based discrimination and in order to prevent a "state action" finding, a statute such as Section 300a-7 was required. Accordingly, it cannot be argued that Congress has adopted the Fourth Circuit rule in enacting

the statute in question. In fact, it cannot logically be argued that the Court below was unaware of this statute when it reached its decision. Indeed, could it be argued that other Courts were unaware of this statute in reaching their determinations in Ward, supra; Norton-Children's Hospitals, Inc., supra; Slavcoff, supra; Hoberman, supra, etc.?

FACTOR II: GOVERNMENTAL REGULATION

The second factor in the Jackson rule "weighs" the "extent and intrusiveness of the governmental regulatory scheme" (496 F.2d at 629). In applying this factor, Dr. Barrett reaches the conclusion that the hospital is subject to such extensive and intrusive governmental regulatory schemes as to change its status from that of a "private" institution into a "public" institution. Were the Court to adopt this argument, the whole concept of a "private" hospital would be destroyed. Clearly, here is an example where the "sifting and weighing of circumstances" recommended in Burton, supra, must be comprehensively undertaken by the Court to determine whether the conduct of the hospital has "become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the... limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966).

Admittedly, one of the most pervasive forms of government involvement is through regulation of private con-

duct. However, unlike other forms of involvement, regulations merely limit the rights and powers of the challenged party as opposed to supporting private conduct. Accordingly, it is difficult to understand how a "state action" finding could be predicated upon regulation. Nevertheless, since regulations are so pervasive and far reaching in the health area, a brief discussion of the scope of regulations and its effect on the hospital's actions are warranted.

Regulations and their interreaction with the concept of "state action" have recently been discussed by the United States Supreme Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

Moose Lodge concerned itself with an action commenced by a negro who was denied food and beverages in the Club's facilities. The negro was brought to the Club by a caucasian member. It was undisputed that each local Moose Lodge is bound by a constitution and general Bylaws of the Supreme Lodge, the latter of which contained a provision limiting membership in the Lodge to white male caucasians. The Lodge's policy was to restrict membership to the caucasian race and permitted members to bring only caucasian guests on the Lodge's premises, particularly in the dining room and bar. (407 U.S. at 166) The plaintiff brought an action under the Civil Rights Act (42 U.S.C. Section 1983) alleging that since the Club had a license granted by the State Liquor Authority and was regu-

lated by the Authority, he was entitled to a decree enjoining the Lodge from continuing its discriminatory actions. The plaintiff in that case theorized that since a license was granted by a state agency, there was sufficient "state action" for the Court to act upon his claim.

However, in dismissing that portion of Irvis' claim on the basis that the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the state in the discriminatory guest policies of Moose Lodge. The Court stated:

> "The court has never held, of course, that discrimination by any otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in the Civil Rights Cases, supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discriminations.' Reitman v. Mulkey, 387 U.S. 369, 380... (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition." (407 U.S. at 173). (emphasis added)

The Court went on to state:

> "Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant. Unlike Burton, the Moose Lodge building is located on land owned by it, not by any public authority. Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostentatiously proclaims the fact that it is not open to the public at large. Nor is it located and operated in such surroundings that although private in nature, it discharges a function or performs a service that would otherwise in all likelihood be performed by the state. In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building."
> (407 U.S. at 175).

The Supreme Court indicated in Moose Lodge that it could not be said that the state in any realistic sense was made a partner or even a joint venturer in that Club's enterprise (407 U.S. at 177). Accordingly, the regulatory scheme of the State Liquor Board did not sufficiently implicate the state in the discriminatory guest policies of Moose Lodge.

Admittedly, "the State of New York plays a substantial role in supervising the actions of private hospitals within its borders." Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020, 1023 (S.D.N.Y. 1971). However, the Supreme Court has stated that this factor alone is an insufficient basis for a finding of "state action." In addition to the regulatory scheme, there must be a nexus between the regulations and the action complained of. Reitman v. Mulkey, 387 U.S. 369, 375 (1967); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968). As Judge Bauman found below, and as Judge Metzner found in Mulvihill, the required nexus is missing. "The state, as part of its general regulatory scheme, does not in any way associate itself with or influence the internal decisions of a hospital's board of trustees to hire or fire staff members." (Mulvihill at 1023). In fact, it would be fair to say that were the state to assume the responsibility of hiring and firing physicians, many persons now voluntarily serving on the boards of hospitals would necessarily resign their positions on the board, since one of their main functions (assuring quality care to the community) would be preempted. As in Moose Lodge, the state can in no manner be said to be a partner or joint venturer with United Hospital.

Parts 720 and 721 of the New York State Hospital Code (10 NYCRR, Section 720 et seq., 721 et seq.) do not add further merit to Dr. Barrett's claim that the scheme of

governmental regulation leads to the conclusion that "state action" is present. Part 720 of the New York State Hospital Code deals with the organization and administration of a hospital. Part 721 deals with the organization of a medical staff. These regulations do cover in some detail the organization and operation of a hospital. However, Section 720.1 entitled, "Governing Authority" states:

> "(a) The governing authority shall be responsible for the establishment of policies and the management and operation of the hospital; it shall not enter into any agreement limiting such responsibility." (emphasis added)

Clearly, the New York State Hospital Code intends to make the hospital's governing authority responsible for its acts and indicates an intention on the part of the legislature not to intrude into this area. Accordingly, the hospital respectfully submits that despite the regulatory nature of the New York State Hospital Code and other applicable laws, internal management has been reserved to the Board of Trustees and therefore, its determinations are not made "under color of state law".

The Court is respectfully invited to review the decisions rendered in Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972); Shulman v. Washington Hospital Center, 319 F. Supp. 252 (D.D.C. 1970); Hoberman v. Lock Haven Hospital,

377 F. Supp. 1178 (M.D. Pa. 1974); Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973); cert. denied, ___ U.S. ___ (1974); Slavcoff v. Harrisburg Polyclinic Hospital, 375 F. Supp. 999 (N.D. Pa. 1974); Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973); Allen v. Sisters of St. Joseph's Hospital, 361 F. Supp. 1212 (N.D. Texas 1973); Anderson v. Louisiana Dental Association, 372 F. Supp. 837 (M.D. La. 1974); Barrio v. McDonough District Hospital, 377 F. Supp. 317 (S.D. Ill. N.D. 1974), all of which dealt with the "government regulation" factor, and found that the regulatory schemes, although pervasive, were insufficient to establish that the hospitals' action was equivalent to "state action."

FACTOR III: GOVERNMENT APPROVAL

The third factor mentioned in the Jackson "five factor test" suggests that in order for a determination of "state action" to be made, it is necessary that there be a finding that the regulatory scheme (Factor II) connotes government approval of the activity in question. This can more simply be called the "nexus" requirement.

In the case at bar, Dr. Barrett is unable to establish this "nexus" requirement. (R209A) Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) made it clear "that the state must be involved not simply with some activity of the institution

alleged to have inflicted injury upon a plaintiff, but with the very activity that caused the injury." (Id. at 81). In this case, the financial aid and governmental regulations are directed toward promoting the construction of new hospitals in a manner which will provide the best type of care available to the community. There is no nexus between the aid and regulations and the employment and termination policies applied with regard to staff members. (R211A) (See also, Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971).

It should be noted that subsequent to the hospital's denial of staff privileges to Dr. Barrett, the New York State Legislature enacted Section 2801-b of the Public Health Law. Subsection 1 of this section provides that it shall be an improper practice to deny staff privileges to a physician without stating the reasons therefor or if the reasons stated are unrelated to standards of patient care, the objectives of the institution or the character or competency of the applicant. Although 2801-b is not applicable to the case at bar since the action occurred prior to the effective date of that law (R78A), the Court below nevertheless considered the effect of this section and found that it did not satisfy the requirement that the state's involvement must aid, encourage or connote approval of the complained of activity. (R217A) The enact-

ment of this legislation was amelioratory not regressive. Shirley v. State National Bank of Connecticut, 493 F.2d 739 (2d Cir. 1974). While the state has clearly expressed an interest in the subject matter by enacting this legislation, such interest does not of itself constitute actual involvement in the action of the hospital in denying Dr. Barrett staff privileges. (See e.g. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974). Dr. Barrett has not shown any "nexus" between the alleged government support on the one hand, and the denial of privileges, on the other. Without the "nexus", his claim must fail. Civil Rights Cases, 109 U.S. 3 (1883); Reitman v. Mulkey, 387 U.S. 369 (1962); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971).

FACTOR IV: PUBLIC FUNCTION AND SURROGATE STATUS

The fourth factor in the Jackson test is the extent to which the organization serves a public function or acts as a surrogate for the state. The greater the "public" function, the greater the likelihood that the action of the "private" institution will be "state action." This is the most subjective factor of the entire test. While this factor is easily applied in those areas where the government has given power

grants, i.e., monopolies, it is less easily applied in the health field. This is truly an area where the Court must "weigh" the significance of the rights sought to be protected as opposed to the rights of the challenged party.

In order to satisfy this requirement, Dr. Barrett has cited the New York State Constitution and various provisions of the Public Health Law of the State of New York. It is his contention that these provisions indicate a "grant of power" from the state to United Hospital and that such "grant of power" requires the hospital to abide by constitutional standards.

Based upon Article 17, Section 3 of the Constitution of the State of New York, Dr. Barrett argues that the state has specifically delegated to private hospitals such as United Hospital, its obligation to provide health care in those areas not served by state owned and operated hospitals. Dr. Barrett seeks to strengthen this argument by claiming support from Section 2805-a (Admission of Patients) and Section 2806 (Hospital Operating Certificates; Suspension or Revocation) of the Public Health Law of the State of New York.

Clearly, these sections do impose certain obligations on all hospitals of a general nature whether they be proprietary (private and profit-making), voluntary (private and not-for profit), and municipal (public). These obligations, how-

eve . e limited in scope (referring as they do to emergencies only) and can in no way be construed as a delegation of the state's obligation as contained in the New York State Constitution.

A more reasonable construction of the quoted provision of the State's Constitution (Appellant's Brief, p.12) and its practical effect on hospitals in this state is that the state, as it so often does, fulfills its obligation through the private sector, through free enterprise and through the means of citizens helping other citizens. This is the way that health care is delivered in New York and indeed, in every other state.

If we take the plaintiff's argument and pursue it to a conclusion, we arrive at a totally unrealistic and undesirable result. For example, it is not unreasonable to say that nutrition is part of health. Therefore, it is the state's obligation to supply food to its citizens or to see that such food is supplied. There are, of course, numerous and very strict regulations governing the growing, processing, packaging, wholesaling, and retailing of food items. Are actions of those involved in this industry to be classified as "state action?" The list is endless. The degree of regulation may vary and indeed, may in some instances be greater than that of the health industry, but the principle is the same. The

invocation of federal jurisdiction on the basis of "state action" must be very carefully scrutinized and restricted or the very individual liberties sought to be protected by-Dr. Barrett will be subject to continuous and inevitable erosion.

Accordingly, while the hospital does in some nature act as a surrogate of the state and performs a "public" function, nevertheless, the hospital has not derived all of its powers from the government, but has merely been regulated in some of its conduct and as has been previously shown, these regulations are not extensive enough nor do they connote such approval of any activity, as to support Dr. Barrett's contention that the action of the hospital in denying him privileges on its Medical Staff was taken "under color of state law."

Dr. Barrett has cited Taylor v. St. Vincent's Hospital, 369 F. Supp. 948 (D.C. Mont. 1973) for the proposition that due to the fact that United Hospital is the sole facility in its area, it has been granted a guaranteed monopoly which would bring the hospital within a state action concept. It should be noted that Taylor does not stand for that proposition. In Taylor, St. Vincent's Hospital was the sole hospital in the area which had facilities available to perform a tubal ligation. Despite this fact, the hospital nevertheless refused to perform a tubal ligation on Mrs. Taylor. Mrs. Taylor commenced an action under the Civil Rights Act and the Court, in

dismissing Mrs. Taylor's complaint, found a lack of "state action" despite the fact that it was the only facility in the surrounding area which could perform the procedure desired by Mrs. Taylor.

The monopoly power granted to United Hospital is in no way as broad and pervasive as the one found in Public Utility Commission v. Pollak, 343 U.S. 451 (1952). Rather, the "monopoly" power granted to United Hospital, more resembles the "partial monopoly" found in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the Court stated:

> "The limited effect of the prohibition against obtaining additional club licenses when the maximum number of retail licenses allotted to a municipality has been issued, when considered together with the availability of liquor from hotel, restaurant, and retail licensees, falls far short of conferring upon club licensees a monopoly in the dispensing of liquor in any given municipality or in the State as a whole."
> (407 U.S. at 177)

Dr. Barrett's reliance upon McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971); Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Cir. 1968); Foster v. Mobile County Hospital Board, 398 F.2d 227 (5th Cir. 1968); O'Neill v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973), is ill-founded. All of these cases involved "public" hospitals or hospitals which

were being operated on "public" land which was being leased at a nominal charge. These are "significant" factors when evaluating the "state action" concept and these factors are not present in the case at bar.

FACTOR V: CONSTITUTIONAL PRIVATE ASSOCIATIONAL STATUS

The fifth factor enunciated in the Jackson decision was "whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms." (Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974).

Dr. Barrett argues that United Hospital is not a club, but a public service facility. He contends that the hospital was created by dedicated people to serve a public need and that since it is "open to all comers" (R208A) it "cannot assert a constitutional claim to be left alone." (497 F.2d at 633).

A review of the record discloses that Dr. Barrett has completely taken out of context that which the lower court has reported. In fact, the lower court has stated that a private hospital does not hold itself out as a public area "open to all comers," as was the case in Evans v. Newton which dealt with a municipal park. Similarly, cases such as Marsh v. Alabama, 326 U.S. 501 (1946) and Amalgamated Food

Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) are not controlling. In Marsh a private company owned and operated an aggregation having "all the characteristics of any other American town" with its streets and public places generally open to all comers, and the private ownership was disregarded. Likewise, in Logan Valley the principle enunciated in Marsh v. Alabama, (a private party performing a "public function") was applied to cover the public walkways and parking areas of a privately owned shopping center. However, in areas of health and education, private parties have retained the right to be recognized as "private" for constitutional purposes. In Powe v. Miles, 407 F.2d 73 (1968) this very Court held that suspension of four students at a liberal arts college did not constitute "state action" as would entitle students to civil rights relief. Similarly, in Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973) this very Court once again affirmed a dismissal of a civil rights suit brought by a student against a private law school which had expelled him for scholastic deficiencies. In Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974) this Court affirmed the dismissal of an action brought under the Civil Rights Act with respect to a claim by a research associate professor who was dismissed from his research project by the institution.

In light of the foregoing cases, and in light of the

existence of the various cases already mentioned specifically dealing with the denial of Medical Staff privileges at a hospital, (See e.g., Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971) it is respectfully submitted that hospitals have the same right to retain their "private" status just as private educational facilities have maintained their "private" status.

JUDGE BAUMAN'S THREE-PRONGED TEST

Dr. Barrett, after urging the Jackson five factor test, next characterizes the test elucidated by the Court below as the "novel" Barrett three-pronged test. Far from being a "novel" concept of the "state action" theory however, the three-pronged test is merely a concise and accurate summary of the applicable decisions which have come down from this Court. Powe v. Miles, 407 F.2d 73 (2d Cir. 1968); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974); Shirley v. State National Bank of Connecticut, 493 F.2d 739 (2d Cir. 1974); Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974). In fact, these decisions more nearly accord with the Supreme Court's opinion in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). (R204A).

Close examination of the "three-pronged test" will disclose that this test is factually and legally very similar

to the "five factor test" enunciated by this Court in Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). Judge Bauman has condensed the five factors (all of which are required to be considered in a case involving racial or class-based discrimination) into a three-pronged approach when the question of racial or class-based discrimination or "public function" is not in issue. It is respectfully submitted that "Prong I", labelled Significant Involvement, is merely nothing more than factors 1 and 2 of Jackson. Additionally, Prongs II and III (the "nexus" requirement and the "state approval" requirement) are merely abbreviated forms of Factors 3, 4, and 5 of the Jackson test.

Since Appellees herein have previously expounded upon the various Jackson factors and have indicated Dr. Barrett's failure to link those factors to them, we shall not now repeat that material which has previously been set forth. However, Dr. Barrett's failure to satisfactorily prove that the governmental aid and pervasive regulations significantly involved the state in the operation and management of a "private" hospital such as United Hospital; his inability to establish a nexus between the state's involvement with the hospital and the hospital's denial of staff privileges to him; and his failure to prove that the state either actively or passively affirmed or approved of the denial of staff privileges to him, are ample reasons to affirm the decision below.

It is respectfully submitted that Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971) is dispositive of all issues in this case. The state's involvement in Mulvihill was not any more significant than the involvement of the state in the case at bar. In addition, the fact that Dr. Barrett's complaint states that the State has involved itself in "the promulgation of rules and regulations" (R8A) and that the State has delegated to United Hospital certain official functions, including but not limited to the power to grant or withhold professional privileges to physicians and surgeons (R9A), should not be considered by this Court as an admitted and uncontroverted fact. The defendants have not answered Dr. Barrett's complaint. In lieu of an answer, the defendants moved under Rule 12 of the Federal Rules of Civil Procedure. Accordingly, while this Court may take the plaintiff's version of the facts as true (Gardner v. Toilet Goods Association, 387 U.S. 167 (1967)), the Court should consider the factual matters presented in the affidavits submitted below (R81-100A, R124-33A, R155-7A, R158-70A and R171-3A) all of which deny many allegations made in the plaintiff's complaint.

Finally, it is respectfully submitted that the lower Court's reliance on cases such as Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1974); Wahba v. New York University, 492 F.2d 96 (2d Cir. 1974); Grossner v. Trustees

of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968); and Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971) are proper. It cannot reasonably be argued that the state has any greater or lesser interest in health than in education. Whether good health is possible in an uneducated society or whether education is possible in an unhealthy society is a question of "which came first, the chicken or the egg" and therefore not really capable of objective determination. In fact, the regulatory scheme in both instances is equally comprehensive. However, in all of the "education" cases the Courts have rejected the "public function" test as has been urged here by Dr. Barrett and met with success in Marsh v. Alabama, 326 U.S. 501 (1946) and Terry v. Adams, 345 U.S. 461 (1953).

Based upon the foregoing, it is submitted that Dr. Barrett has failed to prove that the action of United Hospital in denying his application for Medical Staff privileges was equivalent to "state action" or action taken "under color of state law" and therefore his complaint must be dismissed and the decision below affirmed. His failure to demonstrate "state action" not only affects his civil rights claim (42 U.S.C. Section 1981 et seq.) but is equally dispositive of his claims under the Bill of Rights (First, Fifth, Eighth, and Ninth Amendments to the United States Constitution and the Fourteenth Amendment. The Bill of Rights and

the Fourteenth Amendment to the United States Constitution are applicable only to actions taken by the federal and state governments. The Civil Rights Cases, 109 U.S. 3 (1883). Any claim alleging deprivation of those rights guaranteed by those amendments must demonstrate some form of "state action". Dr. Barrett's failure to show that the action of United Hospital in denying him privileges was equivalent to "state action" provides a sufficient basis for this Court to affirm the findings below.

POINT II

THE DEFENDANTS HAVE GRANTED DR. BARRETT FULL AND COMPLETE DUE PROCESS AND THERE IS THEREFORE NO QUESTION OF LAW OR OF FACT YET TO BE DETERMINED.

Even assuming that Dr. Barrett was successful in proving that the action of United Hospital and the individually named defendants was taken "under color of state law," nevertheless, his complaint must be dismissed and summary judgment granted to all defendants since he has received full and complete due process prior to the denial of staff privileges.

At the time that Dr. Barrett was advised that the Board of Trustees of United Hospital had initially acted unfavorably on his application for Medical Staff privileges, Dr. Barrett was advised that if he wished, he could request a hearing before the hospital's Joint Conference Committee which would review the facts and circumstances and would thereafter make a recommendation to the hospital's Board of Trustees (R112A). After Dr. Barrett had indicated that he wished such a hearing, the hospital again wrote to him to advise him of the reasons why his application was acted upon unfavorably (R113A). Thereafter, on February 16, 1972, a hearing was conducted before the Joint Conference Committee (R32-77A). Dr. Barrett was present at that hearing and was accompanied by counsel of his choice. A stenographic transcript of the proceedings was made and supplied to Dr. Barrett. On March 27,

1972, the Joint Conference Committee convened for the purpose of considering the results of the hearing. At this meeting, after due consideration, it was unanimously concluded that privileges not be offered to Dr. Barrett. This decision was transmitted to the Executive Committee of the Board of Trustees on April 17, 1972, and the Executive Committee, after giving due consideration to all prior recommendations and proceedings, unanimously voted to affirm the Joint Conference Committee's decision. The Board of Trustees received this recommendation at its next regularly scheduled meeting, and the Board, after considering all prior proceedings unanimously voted to affirm the previous denials. Dr. Barrett was notified of this decision on May 3, 1972. (R119A). Almost one full year thereafter, the within action was commenced.

Although there have been literally hundreds of cases which have discussed the concept of "due process", nevertheless, even at this time, a full and comprehensive definition is not available. However, in Fuentes v. Shevin, 407 U.S. 67 (1972), the United States Supreme Court indicated:

> "For more than a century the central meaning of procedural due process has been clear: 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' Baldwin v. Hale, 1 Wall 223, 233, 17 L.Ed. 531... It is equally fundamental that the right to

> "notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552."
> (401 U.S. at 378)

Similarly, in Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court again stated that due process required that an opportunity to be heard at a meaningful time and in a meaningful manner be granted to every individual prior to an administrative body denying that individual any significant property right. While Goldberg involved the termination of welfare benefits, nevertheless, since it deals with a matter pending before an administrative body, it certainly is analogous to the case at bar. Interestingly, in Goldberg, the Court recognized that due process does not require two hearings. One hearing before a responsive and authoritative body is sufficient for purposes of the United States Constitution. (397 U.S. at 267 fn 14).

The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. Boddie v. Connecticut, 401 U.S. 371, 378 (1971). While the right to have counsel available at every significant level of a proceeding has been found to be an element of due process in criminal proceedings (see e.g., Escobedo v. Illinois, 378 U.S. 478 (1964)) such a requirement has not been repeatedly en-

forced in civil or administrative proceedings. In Re Groban, 352 U.S. 330 (1957). Nevertheless, in the case at bar, Dr. Barrett was entitled to bring counsel of his own choice to the hearing and, in fact, did have counsel present with him.

Article III of the Medical Staff Bylaws of United Hospital entitled, "APPOINTMENT TO THE MEDICAL STAFF" provided at Section C:

> "In cases of rejection of an application for appointment or non-renewal or cancellation of an appointment, the applicant shall be afforded the opportunity of appearing and stating his case before the Joint Conference Committee, the members of which will thereafter make their respective recommendations to the Trustees and to the Medical Council as the case may be." (R121A)

At the time in question, as is true today, the Medical Staff Bylaws of United Hospital have been accepted and approved by the Joint Commission on Accreditation of Hospitals. This organization is the nationally recognized accepted body for promulgating standards for American hospitals. The Joint Commission on Accreditation of Hospitals periodically reviews the internal organization and functioning of the vast majority of hospitals in this country. This review includes the hospital's Bylaws and the Medical Staff Bylaws. In order to be accredited, a goal for which every hospital strives and a status necessary

to participate in most state, federal and local programs, the Medical Staff Bylaws must adhere to certain prescribed standards. United Hospital's accreditation at the time in question clearly indicates that its Medical Staff Bylaws were in order and did meet the then existing standards of the Joint Commission on Accreditation of Hospitals.

Dr. Barrett was afforded full and complete due process. He was granted a meaningful hearing at a meaningful time. Notice of the hearing was given to Dr. Barrett and in that notice he was fully apprised of the various reasons why privileges had been denied to him. At the hearing, Dr. Barrett was present with counsel and was given a complete opportunity to respond to the various charges levied against him. Jackson v. Norton-Children's Hospitals, Inc., 487 F.2d 502 (6th Cir. 1973).

Thus, without considering for the moment the "state action" question, we find that a full and fair hearing was held prior to any deprivation of any significant property interest (Goldberg v. Kelly, 397 U.S. 254 (1970)) and full due process as required by the hospital's Bylaws was provided.

CONCLUSION

THE DECISION BELOW SHOULD BE AFFIRMED. THE ACTION OF THE DEFENDANTS WAS NOT TANTAMOUNT TO "STATE ACTION" OR ACTION TAKEN "UNDER COLOR OF STATE LAW.

IN ADDITION, EVEN ASSUMING THAT THE ACTION OF THE DEFENDANTS WAS "STATE ACTION" NEVERTHELESS, DR. BARRETT WAS AFFORDED FULL AND COMPLETE DUE PROCESS WITHIN THE HOSPITAL.

Dated: Great Neck, New York
October 8, 1974

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

WILLIAM A. BARRETT, M.D., : NO. 74-1903

Plaintiff-Appellant, : ATTORNEY'S STATEMENT OF SERVICE BY MAIL

- against - :

UNITED HOSPITAL, ET AL., :

Defendants-Appellees :

- X

STATE OF NEW YORK)
(ss.:
COUNTY OF NASSAU)

JOHN SHERMAN, an attorney admitted to practice before the United States Court of Appeals for the Second Circuit, being associated with HAYT, HAYT, TOLMACH & LANDAU, ESQS., affirms under the penalties of perjury:

1. That I am over the age of eighteen (18) years of age and am not a party to this action.

2. That on the 9th day of October, 1974, I served two (2) copies of the within Appellees' Brief upon LEVY, GUTMAN, GOLDBERG & KAPLAN, ESQS., attorneys for the plaintiff-appellant, and two (2) copies upon CLARK, GAGLIARDI & MILLER, ESQS., attorneys for defendants-appellees, by depositing copies thereof enclosed in a postpaid wrapper addressed to the above-named at 363 Seventh Avenue, New York, New York, 10001, and

175 Main Street, White Plains, New York, 10601, respectively the addresses designated by them for that purpose in the official depository located at 55 Northern Boulevard, Great Neck, New York 11021, under the exclusive care and custody of the United States Post Office Department.

Dated: Great Neck, New York
October 9, 1974

John Sherman

JOHN SHERMAN